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No. 76-589

In the Supreme Court of the United States

OCTOBER TERM, 1976

DELBERT D. BIRCHFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his conviction must be vacated under 28 U.S.C. 2255 because the district court did not personally advise him that by pleading guilty he would waive his right to confront his accusers and his privilege against self-incrimination.

An indictment returned in June 1975 in the United States District Court for the Western District of Oklahoma charged petitioner with one count of knowingly making false statements on a loan application for the purpose of influencing the action of a federally insured bank, in violation of 18 U.S.C. 1014. On July 17, 1975, petitioner pleaded guilty to the charge in the indictment (Pet. App. 2a).

Before accepting the plea the district court determined that petitioner understood the offense charged, it explained that by pleading guilty petitioner would waive his right to trial by jury, and it informed petitioner that if he were to go to trial he would be clothed with the presumption of innocence and that the government would have the burden of establishing his guilt beyond a reasonable doubt. The judge further informed petitioner that the maximum penalty for the offense was two years' imprisonment and a fine of $5,000 and established that petitioner's plea of guilty was free and voluntary and was not the product of threats or promises (Pet. App. 3a-4a; Tr. 3-5). The court then questioned petitioner about the factual basis for the plea (Tr. 6):

> [I]s it true that on or about the 29th of April of this year, here in Oklahoma County, that you knowingly made false statements to the American Bank of Commerce for the purpose of influencing that bank in granting you a loan?

Petitioner responded "[y]es, sir" and also admitted that at the time he made the false statements he was aware that the bank was federally insured (Tr. 6). In light of these responses the court agreed to accept the plea of guilty. On August 28, 1975, petitioner was sentenced to two years' imprisonment.

Petitioner did not appeal his conviction. On November 4, 1975, however, petitioner filed a motion under 28 U.S.C. 2255, contending that the district court had failed to determine whether he understood that, in pleading guilty, he was waiving his rights to confront his accusers and not to incriminate himself. The district court denied relief, and the court of appeals affirmed in an unpublished *per curiam* opinion (Pet. App. 1a-5a).

Petitioner's claim (Pet. 4-5) that his guilty plea was accepted in violation of the requirements of *Boykin* v. *Alabama*, 395 U.S. 238, is insubstantial. As the court of appeals noted (Pet. App. 4a), and as petitioner concedes (Pet. 7), the district judge complied fully with the requirements of Rule 11, Fed. R. Crim. P., by conducting a personal inquiry of petitioner and satisfying himself that petitioner's plea was voluntarily made with an understanding of the nature of the charge and the consequences of the plea. Although the court did not explicitly mention that the guilty plea would waive petitioner's privilege against self-incrimination or his right to confront his accusers, there is no requirement that a defendant be informed of every conceivable constitutional right he would enjoy at trial before his plea of guilty may be considered knowing and intelligent.[1] Indeed, it is significant that petitioner does not allege that he was in fact unaware of his constitutional rights or that his plea was in fact involuntary.

Boykin v. *Alabama*, *supra*, is not to the contrary. In that case, the defendant was convicted following a guilty plea proceeding in which, "[s]o far as the record shows, the judge asked no questions of [the defendant] concerning his plea, and [the defendant] did not address the court." 395 U.S. at 239. In these circumstances, the Court concluded that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242. Here, by contrast, the record clearly

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[1]Effective December 1, 1975, Rule 11 has been amended to require federal courts to address the defendant personally with regard to his right to confront and cross-examine witnesses against him and his right not to be compelled to incriminate himself (Rule 11(c)(3)). As petitioner recognizes (Pet. 7), these amendments were not in effect on the date of his plea.

indicates that petitioner's plea was knowing and intelligent.[2] Finally, although the Court in *Boykin* listed several constitutional rights that are waived by pleading guilty and that the trial judge in that case had failed to mention, these rights were enumerated merely to emphasize the gravity of the trial judge's responsibility, because a defendant who pleads guilty simultaneously waives these rights as well as several others. *Boykin* did not impose a procedural requirement that federal judges enumerate these rights at the Rule 11 proceeding. See *Fontaine* v. *United States*, 526 F. 2d 514, 516 (C.A. 6), certiorari denied, 424 U.S. 973; *Todd* v. *Lockhart*, 490 F. 2d 626, 628, n. 1 (C.A. 8); *United States* v. *Sherman*, 474 F. 2d 303, 305 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

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[2]As the Court stated in *Brady* v. *United States*, 397 U.S. 742, 747-748, n 4: "The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty [in state court] entered his plea understandingly and voluntarily," a requirement already existing in federal courts under Rule 11. See *McCarthy* v. *United States*, 394 U.S. 459, 467.